

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Amendment of Part 1 of the  
Commission's Rules --  
Competitive Bidding Proceeding

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)  
) WT Docket 97-82  
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**REPLY COMMENTS OF AIRTOUCH PAGING AND POWERPAGE, INC.**

AirTouch Paging ("AirTouch") and PowerPage, Inc. ("PowerPage")  
(collectively referred to as the "Companies"), by their attorneys and pursuant to Sections 1.415  
and 1.419 of the Commission's Rules,<sup>1/</sup> hereby reply to comments filed with reference to the  
captioned proceeding. The following is respectfully shown:

**I. Introduction**

1. The Companies submitted comments in this proceeding in support of  
the adoption of general auction rules which would serve to discourage insincere auction  
participation and reduce the risk of post-auction default. Comments filed by several participants  
in this proceeding provided broad support for rules which would foster those goals. Based upon  
the support in the record, the Commission should adopt rules consistent with the comments filed  
by the Companies and these other commenters.

2. The Companies also suggested that while general auction rules should  
be implemented prospectively and govern future auctions, such rules should not supersede  
service-specific auction rules which were developed previously by the Commission after  
substantial industry participation and debate. For example, general auction rules should not  
nullify the compromise reached in the paging auction context with respect to stopping rule  
application. Other commenters also have expressed concern that general auction rules may not

<sup>1/</sup> 47 C.F.R. §§ 1.415, 1.419.

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be appropriate in all circumstances, and that the Commission should approach each auction event with the specific circumstances of service-specific needs in mind. The Companies agree.

3. The Companies supported several Commission proposals designed to increase the flexibility of the Commission's Rules and provide auction participants and high bidders with the ability to respond to financial constraints and customer demand. Those proposals received broad support from commenters and therefore should be adopted.

4. Lastly, the Companies address here two issues raised by the comments. The Companies strenuously oppose the implementation of combinatorial bidding in auctions in which there is no real ability to garner the benefits of combinatorial bidding (e.g., where there are incumbent licensees), as it would inject confusion and delay into the auction process. The Companies strongly support the adoption of a limitation on the duration of freezes which are imposed pending the initiation of auction events. Such freezes can harm the public and preclude licensees from responding to consumer demand.

## **II. Discussion**

### **A. The Commission's Auction Rules Should Deter Insincere Auction Participation and Bidding, and Should Reduce the Risk of Default**

5. The Companies support several of the Commission's proposed auction rules which are intended to reduce speculation in the auctions and the risk of post-auction defaults. Many of the proposals supported by the Companies also received widespread support from other commenters. The Companies suggested that applicants seeking to receive competitive bidding benefits be screened prior to the auction to determine their credit-worthiness, in an effort to avoid defaults after the auctions are completed.<sup>2/</sup> PageNet and Cook supported similar mechanisms which would enable the Commission to determine, prior to the auction, participants'

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<sup>2/</sup> AirTouch and PowerPage Comments at p. 5. Merlin, however, opposed pre-qualification screening for credit-worthiness which could be utilized to preclude an applicant from taking advantage of installment payments. While the Companies agree that the Commission is required to ensure the participation of small businesses in the auction process, the Companies do not believe that this obligation mandates that the Commission become subject to a financial undertaking by a company which, according to commercial business standards, will be unable to meet its financial obligation.

ability to satisfy the financial obligations which they propose to assume.<sup>3/</sup> The Companies also suggested that auction participants be required to maintain upfront payments equal to five percent, but in no event less than four percent, of the total amount of their bids in the most recent round.<sup>4/</sup> This requirement will provide additional assurances that auction participants have the financial wherewithal to meet their payment obligations should they be successful at auction. PageNet also expressed the need for more substantial upfront payment requirements on auction participants.<sup>5/</sup> The Companies support these comments.

6. The Companies suggested that practices implemented during the course of the auction also could alleviate the risk of speculation. For example, the amount of upfront payment refunds to participants who withdraw from the auction prior to its completion should be reduced by an administrative fee which recovers the FCC's costs of maintaining an applicant in the auction until the time of withdrawal.<sup>6/</sup> This suggestion was also offered by PCIA as a way to discourage bad actors from participating in, and then withdrawing from, an auction for strategic purposes unrelated to a desire to provide service to the public.<sup>7/</sup>

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<sup>3/</sup> PageNet suggested requiring applicants to submit audited financial statements prior to the auction. PageNet Comments at pp. 9-10. Cook suggested requiring applicants seeking bidding benefits to certify that they have the ability to make their first year's worth of installment payments. Cook Comments at pp. 12-14.

<sup>4/</sup> AirTouch and PowerPage Comments at pp. 6-7. Airadigm and Merlin oppose this requirement. Airadigm Comments at p. 6; Merlin Comments at p. 9. Merlin argues that the requirement leaves licensees with fewer resources with which to construct their systems. This argument, however, brings up the very concern that is intended to be addressed by the increased upfront payment requirement. If auction participants are not able to meet even an upfront payment obligation during the auction, how do they intend to make the down payment at the end of the auction, much less make installment payments and build-out their markets to retain their licenses if they are successful at auction? The increased upfront payment requirement provides the Commission with a mechanism, during the auction, to prevent defaults.

<sup>5/</sup> PageNet suggested a number of methods by which to increase the current level of requisite upfront payments. See PageNet Comments at pp. 10-11.

<sup>6/</sup> AirTouch and PowerPage Comments at p. 7.

<sup>7/</sup> PCIA Comments at p. 6.

7. The Companies proposed that, subsequent to the auction, all winners should be required to submit second down payments or final payments concurrently regardless of the existence of petitions to deny, and that the Commission should employ cross-defaults to encourage private market solutions to financial difficulties rather than default on Commission license obligations.<sup>8/</sup> Both PCIA and Cook support the Companies' support of cross defaults as a mechanism by which to discourage defaults in favor of private business solutions, and to conserve the Commission's resources by avoiding an otherwise unnecessary re-auction of licenses.<sup>9/</sup>

8. There is support for each of the foregoing rules or policies. The arguments in opposition to these proposals are insufficient to merit the Commission's abandonment of these proposed rules. The Companies respectfully submit that the Commission should adopt these rules as tools to deter speculation and insincere participation in the auction, and to prevent defaults.

B. The Commission's Rules Should Not Supersede Service-Specific Auction Rules Which Have Been Adopted After Substantial Industry Participation and Debate

9. The Companies support the adoption of general rules to govern certain aspects of future auctions. However, where service-specific rules have been adopted after such industry participation and debate, based upon the particular characteristics of a specific industry

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<sup>8/</sup> AirTouch and PowerPage Comments at pp. 9-10. AT&T, Airadigm & AMTA oppose the requirement that auction winners submit second down payments or final payments concurrently regardless of whether petitions have been filed. AT&T suggested that financing may be contingent upon grant of the license. AT&T Comments at p. 4. However, even if a license is not granted because of a petition, payments submitted up to that point by the licensee will be refunded. Thus, no significant financial loss should be incurred. Furthermore, it will ensure any default will occur quickly.

<sup>9/</sup> PCIA Comments at p. 7; Cook Comments at pp. 15-16. Airadigm and Pocket suggested that licensees who default should not be penalized. Airadigm Comments at p. 16; Pocket Comments at p. 9. The Companies disagree. Default penalties encourage parties to participate in the auction process thoughtfully, and with financial resource limitations in mind. These penalties also are one of the tools which discourage speculation. To eliminate these penalties would be inconsistent with these policies. Furthermore, defaults cause those who are not defaulters to have paid more for their licenses.

or characteristics of the spectrum to be auctioned (e.g., encumbered vs. nonencumbered), those service-specific rules should govern.<sup>10/</sup> By way of example, the Companies urged the Commission to leave in place the compromise reached in the paging auction proceeding regarding the applicability of stopping rules. With approximately 15,000 paging licenses being auctioned, the application of a generic simultaneous stopping rule could dramatically lengthen the auction, delay service to the public and impose significant burdens on both the FCC and auction participants. Any reconsideration or further clarification/modification of that compromise should be conducted under the auspices of that proceeding.

10. Several commenters also express the opinion that the Commission should not seek to ensure administrative efficiency at the expense of the particular needs of specific industries.<sup>11/</sup> Based upon the broad support for the retention of service-specific rules for specific auctions where warranted, and the significant harm which may result from the implementation of generic rules which do not accommodate particular industry or spectrum characteristics, the Commission should retain the discretion to employ service-specific rules for future auctions in lieu of the general rules adopted here.

C. Commenters Support Flexible Auction Rules

11. The Companies and several other commenters expressed support for flexible auction rules. The Companies, PageNet and Nextel oppose the adoption of maximum bid increments.<sup>12/</sup> The Companies, Airadigm, Hughes and Nextel oppose the adoption of minimum opening bids.<sup>13/</sup> Auction participants, not the Commission, are the most appropriate

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<sup>10/</sup> AirTouch and PowerPage Comments at pp. 2-5.

<sup>11/</sup> PageNet Comments at p. 7; AT&T Comments at p. 1; Hughes Comments at pp. 1, 3-6; American Automobile Comments at pp. 1-2; Alarm Industry Comments at pp. 1-2; Airadigm Comments at p. 2; Western Wireless Comments, *passim*; PCIA Comments at pp. 2-3; AMTA Comments at pp. 4-5; and Nextel Comments at p. 2.

<sup>12/</sup> AirTouch and PowerPage Comments at p. 11; PageNet Comments at pp. 12-13; and Nextel Comments at pp. 8-9.

<sup>13/</sup> AirTouch and Powerpage Comments at p. 10; Airadigm Comments at p. 17; Hughes Comments at pp. 9-10; and Nextel Comments at p. 7.

parties to attach values to licenses at auction. Permitting parties to submit bids in excess of the minimum bid increment fosters the placement of licenses in the hands of participants who value them most. In addition, the penalties applicable to bid withdrawals and defaults along with the requirement of increased upfront payments during the auction tempers the strategic or insincere use of jump bids or the possibility of defaults. Permitting auction participants to win licenses based upon minimal bids is permissible under the Communications Act, and is consistent with competitive market practices.<sup>14/</sup> If another auction participant places a higher value on that license, it will submit a higher bid. Indeed, any other rule flies directly in the face of the Commission's stated policy to allow market forces, not the Commission, to determine the value of the spectrum.

12. The Companies also supported the Commission's proposal to permit applicants to make limited<sup>15/</sup> minor amendments to their short-form applications to add or delete licenses until such time as applicants submit their upfront payments.<sup>16/</sup> PCIA also supported this proposal.<sup>17/</sup> This rule would enable applicants to correct errors on their short-form applications and to solidify back-up strategies prior to the auction event. The requirement that parties make such amendments prior to the submission of upfront payments prevents them from using this mechanism to game the auction and changing their bidding strategy based upon the bidding eligibility of other auction participants.

13. Several parties supported the Commission's proposal to extend the pre-grant construction rules to all auction winners.<sup>18/</sup> The ability to construct systems prior to the

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<sup>14/</sup> See also PageNet Comments at pp. 11-12, opposing the implementation of a reservation fee for licenses.

<sup>15/</sup> The Companies suggested imposing a limitation on the number of licenses an applicant could add to its short-form application.

<sup>16/</sup> AirTouch and PowerPage Comments at pp. 5-6.

<sup>17/</sup> PCIA Comments at pp. 3-4.

<sup>18/</sup> AirTouch and PowerPage Comments at p. 13; PageNet Comments at p. 16; CTIA Comments; PCIA Comments at p. 6; and Airadigm Comments at p. 18.

official grant of licenses enables licensees to rapidly introduce service to the public, and to begin earning revenues from their systems in order to meet installment payment obligations. Indeed, this will allow, in some instances of encumbered spectrum, for winning incumbents to continue to expand service to the public.

14. A number of commenters agreed with the Companies that the adoption of a safe-harbor to the anti-collusion rules for merger and intercarrier discussions serves the public interest.<sup>19/</sup> In the current setting of inter-carrier agreements and merger/acquisition discussions, safe-harbor exceptions to the anti-collusion rules are critical to carriers' ability to continue their operations and evaluate and pursue business opportunities to ensure the continued competitive viability of their companies. The intra-company certifications which the Companies suggested could be adopted would foster ongoing compliance with the Commission's anti-collusion rules.<sup>20/</sup>

15. Finally, several other commenters agreed with the Companies that limited flexibility with respect to the submission of second down payments and installment payments serves the public interest.<sup>21/</sup> The Companies believe, however, that some proposals in support of increased flexibility go too far. For example, Mountain Solutions and Airadigm suggest that the Commission extend the grace period for late payments to 30 and 60 days, respectively. The Companies believe that these time periods are too long. Auction winners with installment payment obligations are in a position to determine (prior to the payment deadline) whether they have sufficient capital to meet their next payment obligation. This advance notice,

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<sup>19/</sup> AirTouch and PowerPage Comments at pp. 12-13; PageNet Comments at p. 14; AT&T Comments at p. 6-7; PCIA Comments at p. 5; and Metrocall Comments at pp. 4-6.

<sup>20/</sup> AirTouch and PowerPage Comments at p. 12.

<sup>21/</sup> AirTouch and PowerPage Comments at pp. 7-9; Mountain Solutions Comments at pp. 2-3. CIRI opposes liberalization of grace period relief, noting that such relief in a pure commercial setting would require the imposition of additional burdens on the borrower, not simply a five percent late fee. CIRI Comments at pp. 14-15.

coupled with a ten day grace period, should provide financially viable licensees with the ability to secure bridge financing to meet their next payment obligation.

16. In sum, the commenters support auction rules which provide flexibility in the formulation and implementation of back-up strategies, bidding during the auction event, construction of systems to provide service to subscribers, satisfaction of financial obligations, and continuation of negotiations and discussions necessary for the ongoing conduct of business. Based upon this broad support, the Commission should adopt rules consistent with these goals.

D. Miscellaneous

i. Combinatorial Bidding:

17. ACE supports the implementation of combinatorial bidding.<sup>22/</sup> ACE argues that combinatorial bidding speeds along the auction process, provides participants interested in a block of licenses a more efficient and effective method by which to secure those licenses, and eliminates the risk for participants of securing only a portion of the whole numbers of licenses in which they are interested. Notwithstanding ACE's arguments, the Companies respectfully submit that combinatorial bidding should not be employed in auctions of encumbered spectrum (e.g., paging spectrum). Participants in auctions of encumbered spectrum do not undertake the same system/license acquisition planning strategy as do participants in auctions for unencumbered spectrum. For example, participants in the paging spectrum auction will not have available to them clear spectrum which encompasses several license areas, such that the formation of a package of licenses, and a value assessment based upon such a package, is not likely. Furthermore, it is unlikely that encumbered spectrum would be subject to the same economic analysis -- that a bidder would only want the entire package or none of the licenses. The Companies also submit that combinatorial bidding would inject confusion and delay into the auctions. Where so many licenses are at auction (approximately 15,000 in the paging service alone) such additional information would impose a significant burden on the Commission's electronic capabilities. The Commission already has indicated that providing certain bidder

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<sup>22/</sup> ACE Comments, *passim*.



information would slow the process. In addition, it is unlikely that participants will be able to effectively assimilate and use such information during the auction process.

ii. Pre-Auction Freezes:

18. Motorola and AMTA suggest that the Commission adopt a limitation on the duration of freezes which precede the initiation of an auction event.<sup>23/</sup> The Companies strongly support this proposal. The general freeze imposed in the paging service has been in effect for fourteen months.<sup>24/</sup> Freezes imposed in other services have lasted years. Extended freezes generally harm the public and carriers. Freezes prevent carriers from expanding to meet consumer demand. Since all carriers are effected by freezes, consumers also lose the ability to switch carriers to secure larger coverage area. Carriers are harmed by the inability to respond promptly (or sometime at all) to consumer demand. Since the general auction rules adopted here, supplemented by certain service-specific rules, should work to reduce the duration of freezes, the Commission should adopt a limitation on the duration of freezes in order to preclude such adverse effects.

### III. CONCLUSION

19. The Companies have demonstrated that there is ample support in the record for the adoption of rules supported in their comments. Arguments offered in opposition to those proposals fail to address the need for the Commission to implement safeguards against speculation and insincere participation in the auction process and post-auction license defaults.

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<sup>23/</sup> Motorola Comments, *passim.*; AMTA Comments at pp. 17-18.


<sup>24/</sup> The Companies recognize that the Commission granted some relief in the paging context. This relief was very welcome and supported by the public interest.

WHEREFORE, for the foregoing reasons, the Companies respectfully request that the Commission adopt general auction rules consistent with their comments and reply comments submitted in this proceeding.

Respectfully submitted,

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April 16, 1997

## CERTIFICATE OF SERVICE

I, Myra Burke, a secretary in the law firm of Paul, Hastings, Janofsky & Walker, LLP, hereby certify that a copy of the foregoing REPLY COMMENTS OF AIRTOUCH PAGING AND POWERPAGE, INC. has been sent to the following individuals via first class mail, postage prepaid on this the 16th day of April, 1997.

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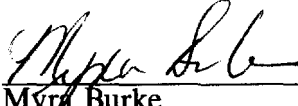
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